

The amendment makes the bill facially unconstitutional by delegating the power to indefinitely delay implementation of a bill (effectively, a pocket veto) to an Advisory Council appointed by the Governor. The amendment also incorrectly references the Advisory Council on Workers' Compensation and Occupational Disease Disablement.

OTHER SUBSTANTIVE ISSUES

WCA indicates advocates for the bill have admitted that the inclusion of a subjective standard (the American Psychiatric Association's diagnostic and statistical manual of mental disorders) will result in litigation in virtually every case. The AMA objective standard is well known in the industry and is the standard used in every other decision concerning impairment under the act.

Additionally, the department notes the amount of potential litigation is unknown, due to limitation in WCA data concerning the relative seriousness of brain injuries that have occurred. The *Leo v. Cornucopia* case, held in New Mexico appellate court, strongly suggests claims of permanent total impairment will be made when the brain injury is not caused by the work accident, but is a pre-existing condition under the present wording of the bill. *Leo v. Cornucopia* states:

“Because the statutory formula in the Workers' Compensation Act, and the 1990 amendments thereto, for determining a worker's residual physical capacity is silent as to the manner by which a judge is to treat a worker's preexisting physical condition in determining permanent partial disability, we believe that the legislature intended that the formula be interpreted and applied in light of both existing precedent exemplified by *Reynolds* and the SIA. Accordingly, we conclude that the legislature, in enacting Sections 52-1-26 to -26.4, intended that when a worker suffers from a preexisting physical impairment, which combines with the impairment attributable to the work-related injury to produce disability, this impairment must be included in the determination of the impairment rating to be used to determine a worker's permanent partial disability.”

The agency recommends retracting the floor amendment, changing page 1, line 22, to read “or” instead of “and,” eliminating one of the standards, and insert language concerning the ontology of the brain injury.

Finally, the Workers' Compensation Administration Advisory Council, after consideration of this bill during a public meeting, tabled this legislation until its next meeting on March 12, 2003.

Synopsis of Original Bill

Senate Bill 479 adds brain injury that results in permanent impairment, as defined by the American Medical Association (AMA) guide to the evaluation of permanent impairment or the most recent addition of the American Psychiatric Association's diagnostic and statistical manual of mental disorders, to the existing definition of permanent total disability.

FISCAL IMPLICATIONS

There is no appropriation or major fiscal impact associated with this bill.

ADMINISTRATIVE IMPLICATIONS

The Workers' Compensation Administration (WCA) anticipates litigation in virtually every case, especially when the two reference sources conflict, and is unsure workload can be absorbed with current staff.

TECHNICAL ISSUES

WCA notes the use of two alternative standards for determining eligibility will certainly create litigation when the standards result in conflicting outcomes as applied to one case. In the absence of statutory guidance as to which standard to use in specified circumstance, this feature will cause unnecessary expense to the system without clear justification.

OTHER SUBSTANTIVE ISSUES

The Department of Health states, according to Centers for Disease Control and Prevention, there are an estimated 1.5 to 2 million traumatic brain injuries (TBI) in the U.S. Brain injuries are among the most likely types of injury to cause death or permanent disability. Each year 80,000 to 90,000 people experience the onset of long-term or lifelong disability associated with a TBI.

No two brain injuries are alike; however, a common thread for all survivors is that their neurons have difficulty carrying messages to their brain. Severe impairments to performing common work-related functions, such as short and long term memory, decision making, planning, sequencing, using sound judgment, reading and writing, communicating, thinking quickly, problem solving, organizing, perceiving self and others, flexibility, safety awareness and new learning, may not be evident in a brain injury survivor's outward physical appearance. In addition, losses can be acute, permanent, and prevent them from being able to obtain and keep a job, which includes going back to the job they held at the time of their accident. Their physical ability to perform work is often limited by: fatigue, weakness, poor balance, speech problems, sleep deprivation, and seizures according to the Brain Injury Association of the United States.

The American Medical Association (AMA) guide to the evaluation of permanent impairment or American Psychiatric Association's global assessment of functioning scale (GAF) are standardized diagnostic objective medical evaluation tools used to measure accurate impairment levels of persons with a brain injury. Persons that score a 50 or less on the GAF are those that usually have multiple symptoms such as unable to keep a job, depressed, defiant, illogical, in danger of hurting self, frequently violent, unable to maintain personal hygiene, and have a serious impairments in social and occupational settings.

WCA indicates the level of impairment of brain function should be consistent with the disabilities in the current law to be fair to physically injured workers.

The Workers' Compensation Advisory Council has had a process in place for several years for the review of proposed legislation affecting the workers' compensation system, pursuant to its statutory mandate. The prior council had a series of public meetings during the summer of 2002 where legislative proposals for this session were discussed. At the council's request, proposals involving changes to workers' compensation benefits were analyzed for their costs by the Workers' Compensation Administration research staff, the National Council on Compensation Insurance and New Mexico Mutual Casualty Company. The specific language contained in this pro-

posal has never been submitted to or reviewed by either the former or current Workers' Compensation Advisory Council. It is the position of the current Workers' Compensation Advisory Council that, at the present time, it opposes this bill.

POSSIBLE QUESTIONS

1. Can temporary or treatable conditions such as depression, a common "secondary mental impairment," contribute to the impairment rating under the standards set out in the bill, resulting in the anomalous result that a temporary and treatable condition results in lifetime benefits?
2. In a case where the two references conflict, which reference should be the dominant reference, the American Medical Association or the American Psychiatric Association?

KBC/njw